In the Supreme Court of Florida

CASE NO. SC05-2170

CHRISTOPHER MORRISON,

Petitioner,

v.

ELEONORA BIANCA ROOS,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

This matter comes before the Court upon certification of a question of great public importance by the First District Court of Appeals. The First District's opinion, rendered on November 2, 2005, reversed a trial court order dismissing Plaintiff/Respondent's amended complaint with prejudice. (A 1-17).[1] Unlike the trial court, the First District believed that a cause of action was stated by Plaintiff's allegations that Defendant/Petitioner Morrison, the back seat passenger in a vehicle, should be held liable to Respondent/Plaintiff Roos, a passenger on a motorcycle who was injured when the driver of passenger Morrison's vehicle backed up and struck the motorcycle. (A 17).

The First District acknowledged that this is a case of first impression in Florida and that its ruling will create liabilities never before imposed on motor vehicle passengers thus raising important policy issues:

> Eleonora Bianca Roos challenges a final order dismissing with prejudice her amended complaint for damages against Christopher

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[1]A conformed copy of the First District's opinion is included in the Appendix to this brief. (A 1-17). The First District's opinion is reported as*Roos v. Morrison*, 913 So. 2d 59 (Fla. 1st DCA 2005) *Ryan Incorporated Eastern v. Continental Casualty Company,* 910 So. 2d 298 (Fla. 2d DCA 2005)Roos v. Morrison, 913 So. 2d 59 (Fla. 1st DCA 2005).

> Morrison for injuries sustained by Roos when the motorcycle upon which she was a passenger was struck by a sport utility vehicle (SUV) in which Morrison was a passenger. The issue before us is whether a vehicular passenger may be held liable to another vehicular passenger in circumstances where the potentially liable passenger was in a superior position to the driver of that passenger's vehicle to observe a potential hazard and gave affirmative advice to the driver which resulted in a collision with the other passenger's vehicle. We determine that a legal duty exists under these circumstances pursuant to the dictates of *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla.1992), and we reverse. This, however, is a case of first impression and involves important policy issues regarding liability and insurance coverage. We, therefore, certify a question of great public importance. (A 1-2).

The question certified by the First District was worded as follows:

> MAY A VEHICULAR PASSENGER BE HELD LIABLE TO ANOTHER VEHICULAR PASSENGER IN CIRCUMSTANCES WHERE THE POTENTIALLY LIABLE PASSENGER WAS IN A SUPERIOR POSITION TO THE DRIVER OF THAT PASSENGER'S VEHICLE TO OBSERVE A POTENTIAL HAZARD AND GAVE AFFIRMATIVE ADVICE TO THE DRIVER WHICH RESULTED IN A COLLISION WITH THE OTHER PASSENGER'S VEHICLE?

(A 17).[2]

Because the case was decided in the trial court on a motion to dismiss, the universe of facts in the case appears in the Plaintiff's operative complaint, which alleged, in pertinent portion:

> 2. On or about July 4, 2002, at approximately 1:35 a.m., plaintiff was a passenger on a motorcycle operated by Murat Demir on Third Avenue North near its intersection with Second Street in Jacksonville Beach, Duval County, Florida.

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[2] As set forth below, Petitioner disagrees with the wording of the question.

3. Mr. Demir stopped his motorcycle a safe distance behind a Chevrolet Tahoe sport utility vehicle which was being driven by Barret Charles Eubanks.

4. Mr. Eubanks was stopped because of traffic which was blocked ahead of him.

5. Defendant, Christopher Morrison, was a rear seat passenger in the vehicle driven by Barret Eubanks.

6. After waiting for a while for traffic to clear, Mr. Eubanks requested that Defendant Morrison turn around in his seat and see if the roadway behind Mr. Eubanks' vehicle was clear so that he could back up his vehicle.

7. Alternatively, without being requested to, Defendant Morrison realized Mr. Eubanks was having difficulty seeing if anything was behind him so Defendant Morrison gratuitously turned around in his seat to see if the roadway behind Mr. Eubanks' vehicle was clear so that he could back up.

8. Defendant Morrison was in a superior position than was Mr. Eubanks to see what was behind Mr. Eubanks' vehicle.

9. Both Barret Charles Eubanks and Defendant Morrison believed that Defendant Morrison was in a much better position to see if Mr. Eubanks could safely back up than Mr. Eubanks was.

10. Mr. Eubanks could not see whether his intended path of travel behind him was clear but Defendant Morrison, if he exercised reasonable care, could see that Mr. Eubanks' intended path of travel was clear.

11. At that moment, Defendant Morrison failed to exercise reasonable care in determining whether Mr. Eubanks' intended path of

travel was clear. Defendant Morrison told Mr. Eubanks that it was clear for him to back up when it was not.

12. This action of Defendant Morrison was gratuitously taken for the benefit of Mr. Eubanks and thus should have been performed in accordance with the duty to exercise reasonable care.

13. Relying on Defendant Morrison's representation that it was safe for him to back up, Mr. Eubanks placed his vehicle in reverse and backed up.

14. As a result of Defendant Morrison's negligence as alleged above, Mr. Eubanks' vehicle struck the motorcycle upon which Plaintiff was a passenger, knocking her to the ground and injuring her.

(A 2-3).

These allegations resulted in the First District's November 2, 2005 decision concluding that there was a duty on the part of passenger Morrison to passenger Roos such that the trial court's order of dismissal with prejudice should be reversed, subject to this Court's assessment of the wisdom of creating this whole new area of liabilities heretofore unknown in the law. (A1-17). Petitioner Morrison timely filed his notice to invoke the discretionary jurisdiction of this Court on November 28, 2005 and this Court accepted jurisdiction by order dated December 19, 2005.

SUMMARY OF THE ARGUMENT

The First District's opinion creates an entirely new - and, Petitioner respectfully submits, dangerously ill-defined - duty concept under which passengers may be held liable for injuries caused to third parties by a driver's error in operating his vehicle. The general facts used by the First District as the basis for its imposition of liability are passengers' providing of observational comments to a driver as to conditions outside the vehicle. The First District based its holding - inappropriately, we submit - on the very limited circumstances under this Court's decision in

Decisions as to whether a complaint is legally sufficient to state a cause of action are reviewed *de novo*. See, e.g., Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732 (Fla. 2002).

ARGUMENT

A. The driver alone has the duty of care in the control and operation of a vehicle

In Bellere v. Madsen, 114 So. 2d 619, 621 (Fla. 1959), this Court explained that the driver of a vehicle at all times has the duty as to its safe operation:

> **[T]he driver** of an automobile--a 'dangerous instrumentality'--**is charged with the responsibility of having his vehicle under control at all times**, commensurate with the circumstances and the locale, and **to maintain a sharp and attentive lookout in order to keep himself**

> **prepared** to meet the exigencies of an emergency within reason and consistent with reasonable care and caution.

See also Wallace v. National Fisheries, Inc., 768 So. 2d 17, 19 (Fla. 3d DCA 2000)(a driver has a duty to drive carefully and avoid hitting other drivers); *Jackson v. Reardon,* 392 So. 2d 956 (Fla. 4th DCA 1981)(as a matter of law, the operator of a motor vehicle has duty to use reasonable care to prevent injury to persons and property within vehicle's path).

As this Court stated in *Miami Paper Co. v. Johnston*, 58 So. 2d 869, 871 (Fla.1952), whether backing up, or moving forward, a person "manipulating a motor vehicle on the highway" must always use due care:

> The general rule supported by a wealth of authority is that **one manipulating a motor vehicle on the highway, whether backing, starting or proceeding ahead, must exercise reasonable care**, circumstances being the guide as to what constitutes reasonable care.

See also Winner v. Sharp, 43 So. 2d 634 (Fla.1949); *Bilams v. Metropolitan Transit Authority*, 371 So. 2d 693, 695 (Fla. 3d DCA 1979); *Coast Cities Coaches v. Donat,* 106 So. 2d 593 (Fla. 3d DCA 1958); Budgen v. Brady, 103 So. 2d 672 (Fla. 1st DCA 1958), *cert. denied*, 105 So. 2d 793 (Fla.1958).

The law has specific rules a *driver* must follow with respect to the act alleged here, backing up on a highway. Section 316.1985(1), Fla. Stat., entitled "Limitations on backing", provides:

> **The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.**

An earlier version of this statute was construed in *Walker v. Grant*, 314 F. Supp. 442, 443 (S.D. Fla. 1970), a case in which a driver backed into traffic under circumstances where his vision was impaired by the configuration of the road, and he struck a motorcycle. The court explained that, under Florida law, a backing driver has the duty to exercise every means at hand to protect others who may be in his vehicle's path, and noted that special hazards to vision serve only to *enhance* the duty:

> **The duty of a backing driver** on a State Road (as this was) is delineated by Florida Statutes, 1967, § 317.731, F.S.A. It required that **such operation must not be done unless it can be made 'with safety and without interfering with other traffic**.' In amplification, **this driver must exercise every 'means at his hand to protect life and property of others that may be in his path.**' *Green v. Atlantic Co.*, (Fla.1952), 61 So.2d 185, 186. In fine, it is **that operator's duty** to apprise the approaching vehicle of the contemplated entry and **to see, and to yield to, any vehicle so near as to constitute a hazard** as the backing automobile moves into the traveled way. **Special hazards to vision only enhance that duty**.

Similarly, in Green v. Atlantic Co., 61 So. 2d 185, 186 (Fla. 1952), this Court also described the legal duty of a backing driver as follows:

> The law is settled that **one may back his automobile over the highways** and public places without being guilty of negligence but

> **the driver is required to sound his horn, use his rear view mirror and exercise every other means at his hand to protect the life and property of others who may be in his path. When there is reason to do so he should continue to look backward and sound his horn in order that others on the grounds may be warned of his approach**.

B. The only duty imposed on passengers is that of using due care for *their own self-protection* unless the passenger has *control* over the driver

In Conner v. Southland Corporation, 240 So. 2d 822, 825 (Fla. 4th DCA 1970) the situations giving rise to passenger liability were described as being strictly limited to instances where a passenger exercises *control and authority* over the operation of the vehicle, or (germane in the comparative/contributory negligence context) *fails to take reasonable actions for his own self-protection*:

> [T]he general rule in Florida is that the negligence of a driver of a motor vehicle is not imputable to his passenger. However, there are three exceptions therein noted, such as, **(W)hen the passenger has authority or control over the driver or the vehicle**, (1) by imposing his will on the driver to see that the vehicle is properly driven, (2) where such authority or control exists by virtue of the relationship of agency or Joint Enterprise between the driver and passenger[3], **or** (3) **where the passenger knows or should know that the driver is not exercising that degree of care essential to the passenger's safety** so that the law imposes a duty upon the passenger to warn, protest, or take other action, and the passenger fails in this duty even though he

[3] There is no allegation here, nor any suggestion by the First District, that the passenger had any "authority or control" over the vehicle or driver, or that the driver and passenger were engaged in a "joint" enterprise." The inapplicability of the "joint enterprise" theory is discussed further below.

> has sufficient time to protest and realizes **that he should intervene for his own safety**.

Thus, a passenger or guest riding in an automobile is generally entitled to "trust the vigilance and skill" of the driver. Knudsen v. Hanlan, 36 So. 2d 192, 194 (1948); Florida E. Coast Ry. Co. v. Keilen, 183 So. 2d 547, 549 (Fla. 3d DCA 1966). Conversely, it is settled that "[a]s a general rule, the negligence of the driver of an automobile **is not imputed to a passenger who has no authority or control over the car or the driver**." Bessett v. Hackett, 66 So. 2d 694, 698 (Fla.1953); *Sisam v. Brantley*, 366 So. 2d 1195, 1196 (Fla. 2d DCA 1979**)**.

In *Bessett v. Hackett*, this Court detailed the limited circumstances under which the passenger himself may have a duty to act for his own protection, or risk being comparatively negligent with regard to his own injury:

> An **exception to the general rule that a guest riding in an automobile is entitled to trust the vigilance and skill of the driver arises where the passenger knows**, or by the exercise of ordinary and reasonable care should know, from the circumstances of the occasion, **that the driver is not exercising that degree of care in the operation of the vehicle compatible with the safety of his passenger**. In such case it becomes the duty of the guest to make

> some reasonable attempt through suggestion, warning, protest or other means suitable to the occasion, to control the conduct of the driver.

66 So. 2d at 698. The *Knudsen v. Hanlan*, 36 So. 2d 192 (Fla. 1948); *Keilen v. Florida East Coast Railway Co.*, 183 So. 2d 547 (Fla. 3d DCA 1966).

The First District's opinion recognized that "[t]he amended complaint contains insufficient allegations to bring it within the 'duty to warn' exception to the general passenger passivity rule." (A 7). The so-called 'duty to warn' exception arises in the comparative negligence context in which *the passenger himself has been injured and seeks recovery*, a scenario not present in this case. This exception to passenger non-liability recognizes that the passenger has a responsibility to mitigate his own damages: it does *not* extend to creating a responsibility on the part of a passenger to others outside the vehicle. The "zone of risk" to those outside the vehicle is created only by the actions of the driver in his manner of operating the vehicle.

As discussed next, courts in other jurisdictions have similar rules, i.e., that a passenger is entitled to leave the operation of the vehicle to the driver whose negligence , if any, is *not* imputed to the passenger *who does not control the vehicle.* These courts also hold that a duty on the part of a passenger arises only in

situations where necessary *for the passenger's own safety*, *not* for the protection of third parties within the zone of risk created by the driver.

In *Dennison v. Klotz*, 532 A.2d 1311, 1315-1316 (Conn. App. Ct. 1987), the court collected a number of the authorities espousing these rules as to passengers:

> These cases, however, **involve only the duty of a passenger in an automobile to exercise reasonable care for [his or] her own safety**. The general rule with respect to a passenger's duty to exercise care or perform some act for the protection of third parties is otherwise: **[A]n occupant of a motor vehicle other than the driver is not liable for injury to a third person due to the negligence of the driver, in the absence of evidence that the occupant had some control over the driver, or that the driver was in the occupant's employ, or that the driver and the occupant were engaged in a joint enterprise**. [citation omitted]. The distinction between a failure to act which will constitute a passenger's contributory or comparative negligence, and a passenger's similar failure to act which will not create liability to a third party, is supported by the case law of other jurisdictions; *see, e.g.*, Martinson v. Cagle, 454 So. 2d 1383, 1386 (Ala.1984); Coffman v. Kennedy, 74 Cal.App. 3d 28, 32-33, 141 Cal.Rptr. 267 (1977); *Martino v. Leiva*, 133 Ill.App. 3d 1006, 1008, 88 Ill.Dec. 935, 479 N.E.2d 955 (1985); Fugate v. Galvin, 84 Ill.App.3d 573, 40 Ill.Dec. 318, 406 N.E.2d 19 (1980); Clark v. Mincks, 364 N.W.2d 226, 231-32 (Iowa 1985); *Akins v. Hamblin*, 237 Kan. 742, 703 P.2d 771 (1985); Anthony v. Kiefner, 96 Kan. 194, 150 P. 524 (1915); Danos v. St. Pierre, 383 So.2d 1019, 1021-22 (La.App.1980), *aff'd*, 402 So.2d 633 (La.1981); Sloan v. Flack, 150 So.2d 646 (La.App.1963); Olson v. Ische, 343 N.W.2d 284, 287-88 (Minn.1984); *Moya v. Warren*, 88 N.M. 565, 544 P.2d 280 (1975); Cecil v. Hardin, 575 S.W.2d 268, 270 (Tenn.1978); *Hale v. Allstate Ins. Co.*, 639 P.2d 203, 205 (Utah 1981); Price v. Halstead, 355 S.E.2d 380, 385-86 (W.Va.1987); *Reiter v. Grober*, 173 Wis. 493, 494-95, 181 N.W. 739 (1921); Winslow v. Brown, 125 Wis.2d 327, 371 N.W.2d 417 (Wis.App.1985).

In Mountain West Farm Bureau Mutual Insurance Company v. Hunt; 82 F. Supp. 2d 1261 (D. Wyo. 2000), the court stated in a discussion of cases involving passengers of intoxicated drivers:

> Most courts hold that, absent ownership or other legal control over the vehicle or a special relationship with the driver, **a passenger in a vehicle operated by an intoxicated driver owes no legal duty to third parties to control, stop or prevent the driver from operating the vehicle, even if he is aware that the driver is intoxicated**. Numerous examples are available to demonstrate this principle. The Kansas Supreme Court stated in *McGlothlin v. Wiles*,
> 207 Kan. 718, Syl. ¶ 1, 487 P.2d 533 (1971)*Hunt* Court further noted that

the clear weight of authority establishes that a passenger does *not* have a duty to third persons injured by the negligence of a driver:

> Other courts are in accord. *See, e.g.,* Lombardo v. Hoag, 269 N.J.Super. 36, 634 A.2d 550, 559 (1993)("the negligence of the operator of an automobile is not chargeable to a passenger who has no control over the car"); *Olson v. Ische,* 343 N.W.2d 284 (Minn.1984)("passenger has no duty to members of the public to control the operation of a motor vehicle by its intoxicated owner, where, ... there is no special relationship between the driver-owner and the passenger"); *Stock v. Fife*,
> 13 Mass.App.Ct. 75, 430 N.E.2d 845 (1982)*Welc v. Porter*,
> 450 Pa.Super. 112, 675 A.2d 334 (1996)*Lego v. Schmidt*,
>
> 805 P.2d 1119 (Colo. App. 1991)*Olson v. Ische*, 343 N.W.2d 284 (Minn.1984), and even an amenable driver may spontaneously react in abrupt and unexpected ways. Any attempt on the part of a passenger to direct the driver or to take over control of the brake or wheel could well become negligence itself, and the passenger is trapped into an instantaneous Hobson's choice between action and inaction. In addition, we find it inappropriate to impose on a passenger a duty that would effectively make him an insurer of third persons against the

> negligence of the driver. Instead of being invested with the liabilities of a guest, he would shoulder those of a master.

In sum, the general law in Florida and elsewhere is clear. Drivers alone are charged with the duty of operating vehicles safely so as not to injure third parties. The only duty of care assigned to passengers in connection with their driver's operation of a vehicle is to use due care *for their own safety*. Passengers have no duty to those outside the vehicle. Under established Florida law, therefore, the trial court was quite correct in its dismissal with prejudice of the amended complaint in this matter.

C. The First District's decision

The First District, however, did not feel constrained by established Florida law. Despite the authorities discussed above, the First District decided to hold that there *was* a legal duty owed by passenger Morrison to passenger Roos. The First District based its decision on the allegation that Morrison undertook to provide advice to his driver in connection with the driver's consideration of a backing up maneuver. The First District cited *Barfield v. Langley*, 432 So. 2d 748, 749 (Fla. 2d DCA 1983) for the following proposition:

> It is axiomatic that an action undertaken for the benefit of another, even gratuitously, must be performed in accordance with an obligation to exercise reasonable care.

There is no action that was taken by the passenger here, however, for the benefit of other vehicles or their occupants, and no allegation of any such action. The First District incorrectly drew an analogy between this *passenger* providing advice to the driver of his own car to be used along with whatever other information and observations the driver might use in determining when and how to move the vehicle and cases dealing with the liability of *drivers* for accidents occurring when they signal other drivers to turn left in front of them. Specifically, the First District cited Kerfoot v. Waychoff, 501 So. 2d 588 (Fla. 1987), WED Transportaton Systems, Inc. v. Beauchamp, 616 So. 2d 146 (Fla. 1st DCA 1993), and Tellechea v. Coca-Cola Bottling Co. of Miami, Inc., 530 So. 2d 1083 (Fla. 3d DCA 1988) as collectively standing for the proposition that the liability of drivers who signal other drivers to proceed is to be decided on a case by case basis, and will depend on the particular facts. The First District quoted the following statement made by this Court in *Kerfoot:*

> Our holding in this case [that the signaling driver was *not* liable] is limited to its circumstances and should not be broadly construed to hold that drivers who give gratuitous signals to other drivers cannot be guilty of negligence for causing an accident.

501 So. 2d at 590. (A 9). The First District summarized the factual criteria to be considered in signaling driver cases as "(1) the meaning of the signals given when viewed in context; and (2) whether it was reasonable, given the position of the signaler relative to danger, for the other driver to have relied on the signal." (A 11).

Based upon these inapposite cases, the First District apparently concluded that "signalers" could be expanded to include *passengers,* and thus that a similar case-by-case analysis ought to be applicable to cases brought by a third-party against a passenger. The First District stated:

> It would seem then that nothing would prevent the principles of *Kerfoot* from being used in the context presented here – namely, where a passenger undertakes a duty to determine whether it is safe for the driver to proceed and fails to use reasonable care in exercising that duty.

(A 11). This statement wholly disregards the fact that *Johnston*, 58 So. 2d at 871. Assessing liability against drivers for improperly signaling other drivers is entirely consistent with the duties that drivers have while they are in control of their vehicles. Unlike drivers, passengers have no requirements for expertise, vision, age, sobriety, knowledge of traffic rules, or otherwise, and certainly no duty like the drivers to provide signals about the movement of vehicles.

It is this fundamental failure to recognize a distinction between drivers and passengers which, we respectfully submit, caused the First District to misapply

Kerfoot line of cases and a passenger providing advice to his own driver in this case, the First District decided to disregard the on-point case of *Halenda v. Habitat for Humanity International, Inc.*,

125 F. Supp. 2d. 1361 (S.D. Fla. 2000) *e.g.*, in *Bessett v. Hackett*, 66 So. 2d 694 (Fla.1953) and . (A 7-8). And, *Halenda*, is factually on point. In *Halenda*, a front seat passenger (Lois) had told the driver (Jack) "it was clear" prior to an attempted passing maneuver that resulted in an accident. 125 F. Supp. 2d at 1364. Correctly applying Florida's established legal principles as to passenger non-liability due to the driver's sole responsibility for operation of a vehicle, the *Halenda* court held:

> Lois' statement to Jack that "it was clear", without more, does not provide a sufficient basis for imputing negligence upon Lois. **Since she was not the driver of the car, Lois had no duty of reasonable care that she could have breached by informing Jack that the westbound lane "was clear."**

125 F. Supp. 2d at 1365.

Brushing aside the highly similar and persuasive *Jagneaux v. Louisiana Farm Bureau Casualty Ins. Co.*, 771 So. 2d 109 (La. App. 2000) as support for its new rule. *Jagneaux*, however, merely made the same mistake we submit was made by the First District here. *Jagneaux* imposed liability on a passenger who was helping the driver check for traffic, but, in so doing, cited only prior Louisiana

cases dealing only with signaling *drivers*, like *Kerfoot* and its progeny. *See* Lennard v. State Farm Mutual Automobile Ins. Co., 649 So. 2d 1114, 1118 (La. App. 1995) and Martin v. New Orleans Public Service, 553 So. 2d 994 (La. App. 1989).

With no discussion of any distinction between a driver (who has signaling duties under traffic laws) signaling to another vehicle and a passenger (who has no signaling duties) signaling to his own driver, *Jagneaux* became the only known reported decision in the country to find a passenger potentially liable to a third party based upon information provided by the passenger to his own driver. The First District adopted the *Jagneaux* disregard of the distinction between drivers and passengers, and sweepingly concluded that "[i]n accordance with *Jagneaux*, [the Plaintiff's] allegations were more than sufficient to withstand a motion to dismiss." (A 14).

We submit that *Jagneaux* should not be followed at all as it was just wrongly decided and unsupported by any law in Louisiana or the entire country. Furthermore, and ironically, the Plaintiff's allegations here did not satisfy the criteria stated in *Jagneaux* for imposing liability upon a passenger who signals a driver. In *Jagneaux*, a passenger climbed to the *exterior* of a mud-covered tractor to see if the street was clear and made some gesture to the driver just before he

crossed and caused an accident. 771 So. 2d at 110. *Jagneaux* relied upon *Kerfoot* line of cases, as the court below recognized in identifying one of the factors to be considered: "whether it was reasonable, given the position of the signaler relative to danger, for the other driver to have relied on the signal." (A 11). *See also* Dixie Farms, Inc. v. Timmons, 323 So. 2d 637, 639 (Fla. 3d DCA 1976), *cert. denied* 336 So. 2d 1181 (Fla. 1976) ("A driver does not have an absolute right to rely upon the judgment of a third person concerning whether he should proceed into a dangerous area with his automobile.").

The Louisiana courts applying *State Farm Automobile Ins. Co. v. Maher*,

798 So. 2d 300 (La. App. 2001)**§ 876** The First District (incorrectly) assumed that Petitioner's argument below was that the actions of the driver were an 'intervening cause' of the Plaintiff's injury. The First District then cited *Goldberg v. Florida Power & Light*, 899 So. 2d 1105, 1116 (Fla. 2005) for the proposition that if an intervening cause is foreseeable, the original negligent actor may still be held liable. (A 15). The Court further relied upon § 876 of the Restatement (Second) of Torts to 'support' its proposal. The "acting in concert", suggestion, however, only begged the question presented because the acting-in-concert doctrine stated in § 876 applies only if both actors *already have existing legal duties to a third party*. Section 876 provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result, and **his own conduct, separately considered, constitutes a breach of duty to the third person**.[4]

Adoption of the First District's suggestion that the unpled "acting in concert" theory could be applied to the allegations made here would expand that theory *far* beyond any of the few authorities from other jurisdictions that have applied the doctrine in the driver/passenger context and beyond any application ever recognized in Florida.

While it appears that Florida recognizes the acting in concert theory generally, *see,* Acadia Partners, L.P. v. Tompkins, 759 So. 2d 732 (Fla. 5th DCA 2000), it has never been applied to a motor vehicle passenger, let alone to a passenger merely providing advice to the driver. In *Kilgus v. Kilgus,* 495 So. 2d 1230 (Fla. 5th DCA 1986), one of the few Florida decisions addressing the theory,

[4] The First District quoted only subsections (a) and (c) of § 876, apparently deeming subsection (b) to be inapplicable.

the court specifically held that the providing of advice to another to take action which may be done negligently does *not* amount to a "concert of action" or "aiding and abetting":

> The father's suggestion to the son to use the lighter fluid to reignite the cooking fire does not render the father liable for the son's negligence in using the lighter fluid. **A mere suggestion to another to take action that may be done negligently or non-negligently does not amount to a 'concert of action' between the suggestor and the actor** even if that theory of liability is viable in Florida. *See* Conley v. Boyle Drug Company, 477 So.2d 600 (Fla. 4th DCA 1985). The father's **suggestion does not constitute the giving of 'substantial assistance'** to the son's performance of a negligent act **nor does it make the father liable as an 'aider and abettor.'** See generally Restatement (Second) of Torts § 876(b) comment d (1979); Halberstam v. Welch, 705 F.2d 472 (D.C.Cir.1983).

495 So. 2d at 1231.

Indeed, the concert of action theory, which is akin to civil conspiracy and aiding and abetting, has not been applied anywhere in the manner that the First District has now suggested. Most courts considering such claims have *rejected* the "acting in concert" theory where third parties sought to impose liability on a vehicle passenger (usually in the context of an intoxicated driver). *See, e.g., Hurt v. Freeland*,

589 N.W.2d 551 (N.D. 1999)§ 876*Shinn v. Allen*,

984 S.W.2d 308 (Tex. App. 1998)*Heick v. Bacon*,

561 N.W.2d 45 (Iowa 1997)*Brandjord v. Hopper*,

688 A.2d 721 (Pa. App. 1997)*Welc v. Porter*, 675 A.2d 334, 339 (Pa. App. 1996)(to act in concert, driver and passenger must act in accordance with an agreement to cooperate in a particular tortious line of conduct; driver and passenger voluntarily consuming alcohol does not create liability under § 876(a)); Clayton v. McCullough, 670 A.2d 710, 712 (Pa. App. 1996)(allowing intoxicated driver to drive did not constitute substantial assistance and encouragement of tortious conduct); Lind v. Slowinski, 450 N.W.2d 353 (Minn. App. 1990)(for acting in concert theory to apply, participants must know of the plan and its purpose and take affirmative steps to encourage the achievement of the tortious result; accompanying and drinking with drunk driver did not constitute agreement or substantial encouragement); Cully v. Bianca, 231 Cal. Rptr. 279, 281 (Cal. App. 1986)(purported concerted action in transporting and consuming alcohol with driver did not constitute substantial assistance or encouragement as required by § 876); *Olson v. Ische* 343 N.W.2d 284 (Minn.1984)(passenger of drunk driver was not acting in concert); § 876).

By contrast, the few decisions which have deemed the "acting in concert" theory of § 876 applicable to impose liability on a passenger have invariably involved allegations, absent here, of egregious and affirmative passenger misconduct, such as actively encouraging and participating in violations of the law

and continuing to provide drugs and alcohol to already impaired drivers. No case finding a passenger to have "acted in concert" has involved a mere advice-giving passenger.

In *Aebischer v. Reidt,*

704 P.2d 531 (Ore. App. 1985)Section § 876(b)*Sanke v. Bechina*,

576 N.E.2d 1212 (Ill. App. 1991) *Sanke* court held that in light of the two drivers' "vehicular competition" and Bechina's substantial encouragement of reckless driving, the facts constituted joint and concerted tortious activity within *Cooper v. Bondoni,*

841 P.2d 608 (Ok. App. 1992) *Shelter Mut. Ins. Co. v. White,*

930 S.W.2d 1 (Mo. App. 1996)*Cooper*, and recognizing a cause of action for passengers **substantially encouraging driver to speed and to ignore traffic signs** and to drive under the influence).

In Vetter v. Morgan, 913 P.2d 1200 (Kan. App. 1995) Morgan, a passenger in a car which pulled up next to Vetter's van, personally threatened and harassed the other driver:

> Vetter was injured when her van ran off the road after an encounter with a car owned by Morgan's father and driven by Dana Gaither. Morgan and Jerrod Faulkner were passengers in the car. Vetter was alone at 1:30 or 1:45 a.m. when she stopped her van in the right-hand westbound lane of an intersection at a stoplight. Morgan and Gaither

> drove up beside Vetter. **Morgan began screaming vile and threatening obscenities at Vetter, shaking his fist, and making obscene gestures in a violent manner**. According to Vetter, **Gaither revved the engine of the car and moved the car back and forth while Morgan was threatening** Vetter. Vetter testified that **Morgan threatened to remove her from her van and spat on her van door when the traffic light turned green**. Vetter stated she was very frightened and thought Morgan was under the influence of drugs or alcohol....When the traffic light changed to green, both vehicles drove forward...the car driven by Gaither veered suddenly into her lane, and she reacted by steering her van sharply to the right. Vetter's van struck the curb, causing her head to hit the steering wheel[.]

913 P.2d at 1202. The *Vetter* Court, stating that *Sloan v. Fauque,* 784 P.2d 895 (Mont. 1989) affirmed a judgment against the teenage passengers of a car which chased and collided with another car, where the passengers had agreed to chase and beat up the teenagers in the other car in a dispute over a beer keg. 784 P.2d at 895-896. As part of the chase leading to the collision, the passengers assisted in freeing their vehicle when it was stuck on a fence, leaned out of the windows, yelled at the other vehicle and threw a piece of rubber at the other vehicle. *Id.* The court held that the passengers **acted affirmatively in a joint tortious plan to assault the occupants of the other vehicle**, substantially assisted in freeing the vehicle from the fence to continue the chase, and provided substantial assistance and encouragement. *Id.*

In short, the few cases imposing liability on a passenger under the acting-in-concert theory involve extreme passenger misconduct which constitutes a wrong in and of itself, such as engaging in assaults or encouraging and substantially assisting illegal activities. The theory has never been applied, and by its own terms is not applicable, to a passenger who merely provides information to his driver. Accordingly, the First District further erred in opining that the allegations of the amended complaint "may be interpreted to mean that the driver and Morrison were acting in concert", (A 16). There is no legal basis or policy reason for such a radical expansion of the acting in concert theory.

E. No "joint enterprise" theory should be considered

There is no allegation here, nor did the First District suggest, that the passenger had any authority or control over the vehicle or the driver, or that the driver and the passenger were engaged in a "joint enterprise." However, simply for purposes of completeness in discussing the potential bases of passenger liability, Petitioner here briefly discusses this now largely outmoded theory.

The "joint enterprise" theory of liability is not applicable in Florida to make a passenger liable for injuries to a third party.*Kane v. Portwood*,

573 So. 2d 980 (Fla. 2d DCA 1991)*Kane* described the elements of a joint enterprise as:

> 1) an agreement, express or implied, to enter into an undertaking, 2) a community of interest in the objects and purposes to be accomplished in the undertaking, and 3) equal authority to control the undertaking.

573 So. 2d at 985.

The key element missing in any effort to apply the joint enterprise theory to cases such as this is the passenger's ability to **control** the vehicle. As this Court held in Yokom v. Rodriguez, 41 So. 2d 446 (Fla. 1949) in rejecting the applicability of joint enterprise theory:

> It is not sufficient that the passenger indicates the route or that both parties have certain plans in common, such as a 'joy ride'; **the community of interest must be such that the passenger is entitled to be heard in the control and management of the vehicle--such as practically to amount to joint or common possession thereof**.

41 So. 2d at 447.

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[5] These include efforts to use the joint enterprise theory to: (1) avoid the harsh results of the prior guest passenger statute (formerSection § 320.59, repealed by Laws 1972, c. 72-1, § 1 § 320.59, repealed by Laws 1972, c. 72-1, § 1), since a joint enterprise with the driver would allow an injured passenger to recover for simple, rather than gross, negligence; (2) to impute a driver's negligence to his passenger to bar the passenger's recovery from a third party under contributory negligence principles; (3) to make a passenger liable to third parties for the negligence of his driver; (4) to impute the negligence of an employee/driver to a spouse suing the employer; and (5) to impute the driver's negligence to the

The court in *Florida Power & Light Company v. Polackwich*,

> 677 So. 2d 880 (Fla. 2d DCA 1996) *Kane v. Portwood*, 573 So.2d 980 (Fla. 2d DCA 1991). Because **a car is normally driven by one licensed person**, the doctrine is difficult to prove in that context. The record in this case, on the other hand, establishes that Dr. Polackwich and his adult stepson had an express or implied agreement to undertake this sailing adventure. They had a community of interest in the objects and purposes to be accomplished in the undertaking. *See Mitchem v. Gabbert*,

31 S.W.3d 538 (Mo. App. 2000)*Moya v. Warren*, 544 P.2d 280 (1975)(no "joint enterprise" where there was no ability of the passenger to control the vehicle).

The joint enterprise theory has no arguable application to the allegations at bar, and is not generally deemed viable outside of a commercial context. *See generally,* Annotation: Modern Status of Rule Imputing Motor Vehicle Driver's Negligence to Passenger on Joint Venture Theory, 3 ALR 5th 1. There is no reason to consider the 'joint enterprise' doctrine here as a final possible basis for finding liability.

F. Expanding the liability of automobile passengers has profound public policy implications.

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passenger suing a third party who is entitled to raise the driver's comparative negligence. 573 So. 2d at 982-984.

For over one hundred years, the law surrounding liability for automobile accidents has centered on the basic premise that the *driver* has a duty to control and operate the vehicle and to use reasonable care to prevent injury to persons and property within the vehicle's path. The bedrock rule of driver responsibility animates the entire body of automobile tort law. It is the basis of the extensive statutory schemes regulating the licensing of drivers, the operation of automobiles, and requirements for insurance. The legal responsibility of the driver for the safe operation of the vehicle is vital to the public interest in having safely operated vehicles on the highways.

Nevertheless, parties in accident cases over the years have tried, under a variety of theories, to impose liability upon vehicle passengers. The rule that the driver, and not the passenger, is legally responsible has been reiterated and upheld in hundreds of decisions, subject only to the most limited exceptions. Passenger responsibility is limited to: (1) cases arising in the comparative negligence context and imposing on passengers the duty to act reasonably for *their own self-protection*; (2) situations where a passenger has *control* over the vehicle; and (3) cases where a passenger "acts in concert" with the driver in the commission of tortious acts by engaging in extreme passenger misconduct which constitutes a wrong in and of itself and substantially assists or encourages wrongful conduct.

Prior to the First District's opinion below, the Florida cases which found some element of passenger responsibility were strictly limited to these categories, and specifically the first two of them. With regard to **passenger "self-protection,"** *see, e.g.,* Henley v. Carter, 63 So. 2d 192 (Fla. 1953)(passenger contributorily negligent by failing to act for own safety); *Loftin v. Bryan,* 63 So. 2d 310 (Fla. 1953)(passenger on a "wild party" with driver failed to exercise due care for own safety)*;* Florida Motor Lines v. Hill, 137 So. 169 (Fla. 1931)(passenger duty to act to avoid own injury); Maloney v. Williams, 732 So. 2d 415 (Fla. 5th DCA 1999)(seat-belt defense applicable against passenger)*;* Osgood Industries, Inc. v. Schlau, 654 So. 2d 959 (Fla. 2d DCA 1995)(seat belt defense applicable to passenger despite passenger's lack of control over vehicle); Pages v. Dominguez, 652 So. 2d 864 (Fla. 4th DCA 1995)(passenger duty to wear seat belt for self-protection); *Bonds v. Fleming*, 539 So. 2d 583 (Fla. 5th DCA 1989)(seat-belt defense applicable to passenger of intoxicated driver); *American Automobile Assoc. v. Tehrani*, 508 So. 2d 365 (Fla. 1st DCA 1987)(passenger duty to use seat belt for self protection); *Gavel v. Griton*,

183 So. 2d 10 (Fla. 2d DCA 1966)*Smart v. Masker*,

113 So. 2d 414 (Fla. 1st DCA 1959)*Union Bus Co. v. Smith*,

140 So. 631 (Fla. 1932)*Kaplan v. Wolff*,

198 So. 2d 103 (Fla. 3d DCA 1967) *Jagneaux, supra*, all authorities we have located from other jurisdictions restrict the imposition of responsibility on vehicle passengers to the three discrete categories of circumstances noted above. With regard to **passenger self-protection**, *see, e.g., Hasha v. Calcasieu Parish Police Jury*, 651 So. 2d 865 (La. App. 1995)(passenger responsible for failing to act for own self-protection); *Sledge v. Continental Cas. Co.*, 639 So. 2d 805 (La. App. 1994)(passenger failed to act for own self-protection).

With regard to passenger **control of a vehicle**, *see, e.g.* Pittman v. Frazer, 129 F.3d 983 (8th Cir. 1997)(jury issue on whether passenger liable under joint enterprise theory where passenger and driver had mutual control of vehicle); Tatlock v. Nathanson, 169 F.Supp. 151 (D. Del. 1959)(passenger in control of operation of vehicle); Tucker v. Albert Rice Furniture Sales, Inc., 367 S.E.2d 427 (S.C. App. 1988)(truck passenger with equal right to control and direct operation of vehicle); Snyder v. Bergeron, 501 So. 2d 291 (La. App. 1987)(control of vehicle, statutory duty not to permit inexperienced driver to operate); *Hetterle v. Chido*, 400 N.W.2d 324 (Mich. 1987)(control of vehicle, passenger liability for hitting driver on head interfering with driving); *Public Service Mut. Ins. Co. V. Slating*, 448 N.Y.S.2d 349 (N.Y. App. 1982)(control of vehicle, driving instructor); *Red Ball Motor Freight, Inc. v. Arnspiger*,

449 S.W.2d 132 (Tex. App. 1970)*Hession v. Liberty Asphalt Products, Inc.*,

235 N.E.2d 17 (Ill. App. 1968)*Manley v. Horton*,

414 S.W.2d 254 (Mo. 1967)*Slutter v. Homer*,

223 A.2d 141 (Md. App. 1966)*Lazofsky v. City of New York*,

254 N.Y.S.2d 349 (N.Y. App. 1964)*Whiteside v. Harvey*,

239 P.2d 989 (Colo. 1952)*Matheny v. Central Motor Lines, Inc.*,

65 S.E.2d 368 (N.C. 1951)*Frye v. Baskin*,

231 N.W.2d 630 (Mo. 1950)*Dicranian v. Foster*,

45 A.2d 650 (Vt. 1946)*Kelly v. Lowney & Williams*,

126 P.2d 486 (Mont. 1942)*Jones v. Kasper*,

33 N.E.2d 816 (Ind. 1941)*Levangie v. Gutterson*,

194 N.E. 79 (Mass. 1935)*Greenie v. Nashua Buick Co.*,

159 A. 817 (N.H. 1932)*Shelter Mut. Ins. Co. v. White*,

930 S.W.2d 1 (Mo. App. 1996)*Vetter v. Morgan*, 913 P.2d 1200 (Kan. App. 1995)(civil conspiracy and aiding and abetting threats to other driver); Prough v. Olmstead, 619 N.Y.S.2d 404 (N.Y. App. 1994)(active participation by passenger in concerted activity of engaging in high-speed chase); Wheeler v. Murphy, 452 S.E.2d 416 (W. Va. 1994)(passenger substantially assisted and encouraged driver's intoxication); *Coopman v. State Farm Fire and Cas. Co.*, 508 N.W.2d 610 (Wis.

1993)(passenger aided and abetted high speed chases and fighting);*Cooper v. Bondoni,* 841 P.2d 608 (Ok. App. 1992)(acting in concert as to intoxication and violations of law); *Sloan v. Fauque,* 784 P.2d 895 (Mont. 1989)(joint tortious plan to assault the occupants of the other vehicle); *Aebischer v. Reidt,* 704 P.2d 531 (Ore. App. 1985)(acting in concert as to intoxicated driver).

The First District's ruling that a passenger may now be held liable to a third party for the act of communicating with the driver about the passenger's opinion of traffic conditions is a dramatic and unprecedented departure from the established concept of driver responsibility. Aside from being premised on a flawed legal analysis, as discussed above, employing

Based upon the forgoing facts and authorities, Petitioner respectfully submits that the certified question should be answered in the negative; that the decision of the First District should be disapproved; and that the case should be remanded for reinstatement of the trial court's order of dismissal with prejudice.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on the Merits was sent by U.S. mail this 2nd day of February, 2006 to: Thomas E. Duffy, Jr., Esquire, 233 East Bay Street, Eighth Floor Blackstone Building, Jacksonville, Florida 32202.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief on the Merits complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.